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THE EASEMENTS ACT WITH SPECIAL REFERENCE TO ALTERATIONS OF THE LAW MADE THEREBY.

One of the provisions of the Easement Act which may appear to some, perhaps many, of questionable soundness or expediency, which has been disapproved of by at least one Indian Judge,[1] and which may not improbably have been among the provisions of the Act which did not meet with approval in Bengal and prevented the Act being made law in that Province, is the enactment which forms paragraph (*d*) of Section 13. This paragraph provides that on a transfer being made by the owner of immoveable property of a portion only of that property, there is an implied reservation to the transferor, as an easement, of any apparent and continuous quasi-easement (though not being one of necessity), which he before and up to the time of the transfer used over the transferred portion for the beneficial enjoyment of the remainder (or some of the remainder) of his property, unless a different intention is expressed or necessarily implied. The transferor and the transferee are, by this section, put exactly on a par, by identical language *mutatis mutandis* [paragraphs (*b*) and (d)], the former being made equally entitled by implied reservation to such easements over the property transferred, as the latter is made entitled by implied grant to such easements over other property of which the transferor then retains the ownership. This is contrary to the law of England, as established by decisions of the Courts

1. See *Chunilal Mancharam* v *Manishankar Atmaram*, (1893) I. L. R. 18 B. at pp. 626, 627.

there.[1] Those decisions base themselves on the doctrine that a grantor cannot derogate from his own grant, and hold that it is involved in this doctrine that (in the case of alienations of the kind now under consideration) while the grantee is entitled by implication from the mere grant of the tenement to any continuous and apparent easement over the tenement of the grantor retained by the latter which was at the time of the grant in use as a quasi-easement, the grantor is not correspondingly entitled to any such easement over the tenement granted, which had, similarly, been in use at the time of the grant as a quasi-easement, unless he expressly reserves it. To take the instance of a right to access of light, the owner of a piece of ground and a house with windows overlooking it, who alienates the piece of ground but not the house, is not entitled, under the English law, by implied reservation, to the access of light passing over the piece of ground to those windows, for however long a period next before the grant the access of that light may have been enjoyed for those windows during the unity of ownership of the house and piece of ground, and however conspicuously apparent it may be that those windows depend for their light on light passing over the piece of ground.

Little, if any, authority on the question as to implied reservations of easements now under consideration is to be found in the Reports of Indian Cases which arose before the Indian Easements Act was passed, nor is there much to be found in the Reports of those which arose subsequently but to which that Act was not applicable.

Charu Surnokar v. *Dokouri Chunder Thakoor*[2] cannot be looked upon as a decision upon the question whether on the severance of immoveable property into two separate tenements, by the owner of the entire property making an alienation of portion thereof, retaining the ownership of the other portion adjoining the former, he impliedly reserves to himself any continuous and apparent easement over the portion so alienated which he imme-

1. *Suffield* v. *Brown*, (1864) 4 De G. J. & S. 185; s.c. 33 L. J. Ch. 249, *Wheeldon* v. *Burrows*, (1879) 12 Ch. D. 31 ; *Crossley & Sons* v. *Lightowler*, (1867) L. R. 2 Ch. App. 478, 486 ; *Ray* v. *Hazeldine*, [1904] 2 Ch. 17 ; *White* v. *Bass*, (1862) 7 H. & N. 722 ; s.c. 31 L. J. Ex. 283 and other cases.

2. (1882) I. L. R. 8 C. 956.

diately before the alienation was using, as a quasi-easement, for the beneficial enjoyment of the portion retained by him. From the statement of the facts of the case given in the judgment (there is no statement of them given by the reporter except what appears in the judgment) it does not appear clearly whether both the plaintiff, the owner of one of the two tenements into which the original entire property had been divided, and the defendant's predecessor in title, the owner of the other tenement, had purchased their respective tenements, from the person who owned them both in their undivided condition, at one and the same time or had purchased them at different times. The judgment states that " it is an admitted fact that the plaintiff's premises and the defendant's premises, which adjoin, originally belonged to the same owner, and it appears that the plaintiff and the defendant " (by the ' defendant,' the judgment explains, in the next sentence, is here meant the defendant's predecessor in title) " obtained their respective tenements by purchase more than twenty years ago ;" the judgment also refers to the defendant's claim as " this implied grant,[1] " and neither the word " reservation " nor the word " re-grant " occurs throughout the judgment. There is nothing else in the judgment enlightening us on the question on what date or dates the alienations of the two tenements to the plaintiff and the defendant's predecessor, respectively, were made. There is nothing, therefore, in the report from which it can be inferred that those alienations were made at different times ; so much as is stated on the question as to when they were respectively made, seems to favour the inference that they were made simultaneously, or, if not made simultaneously, that it was the owner of the tenement alienated by the first alienation, not the owner of the tenement which the alienor then retained, who claimed the easement, because the use of the word " grant " (in its context), and the absence of the word " reservation," in the judgment, tend to shew that the question which arose was not whether there had been an implied reservation but whether there had been an implied grant of an easement. The case, therefore, is certainly not an authority either affirming or disaffirming the proposition which has been made law by paragraph (*d*) of S. 13 of the Easements Act. A case of simultaneous alienations of two adjoining tenements to different persons by a person who is the owner of them both, is

1. (1882) I. L. R. 8 C. at p. 958.

The next case to be considered is *Wutzler* v. *Sharpe* [1] a suit instituted in 1889, in which the plaintiffs, as owners and occupiers of a tenement, claimed a right of way over the defendant's adjoining tenement for the purpose of taking and conveying on mules loaded with *pakhâls*, water from a spring on the defendant's tenement, by a pathway over that tenement, to, and for the beneficial use of, their (the plaintiffs') tenement. In and previous to 1886 the two tenements had been united in ownership. In that year the owner of them both had sold one of them to the plaintiffs, and in 1888 he had sold the other to the defendant. During the union of ownership the pathway in question had been used, for the beneficial enjoyment of the tenement which was afterwards sold to the plaintiffs, in the manner and for the purpose in and for which the plaintiffs claimed the right to use it. The question which the case presented for decision was whether, when the plaintiffs' tenement was transferred to them, the transfer carried with it by implication a transfer to them of a right of way over the transferor's other tenement which he subsequently transferred to the defendant (being the right of way claimed in the suit). The Court held that the right of way claimed was not an easement of necessity inasmuch as the plaintiffs could, though at much greater expense, procure water, sufficient for their wants, from the defendant's spring by *bhishtis* passing to and fro over a steep zigzag public path leading to the spring. They also held that the plaintiffs having refused to produce their title-deed by which their tenement was transferred to them and the onus being on them to prove their claim to the right of way, it could not be presumed that the deed contained any specific grant of the easement or any general words under which it would pass, and that even if the right of way could pass by implication by the conveyance of the tenement itself without any general words, in the absence of anything in the deed from which a contrary intention was shewn, it could not be presumed that the deed contained nothing shewing such contrary intention, and that therefore the plaintiffs had failed to prove their claim to the right of way. Thus, this case raised no question as to implied reservation of an easement, but only a question as to an implied grant of one.

1. (1893) I. L R. 15 A. 270.

Bolye Chunder Sen v. *Lalmoni Dasi*[1]; *Kadambini Debi* v. *Kali Kumar Haldar*[2]; *Purshotam Sakharam* v. *Durgoji Tukaram*[3]; *Ratanji* v. *Edalji*[4] were cases of partitions, and, like cases of simultaneous grants or alienations of two tenements previously united, involved the question whether there was an implied transfer, not whether there was an implied reservation, of an easement in favor of one tenement over the other tenement.

But in *Chunilal Mancharam* v. *Manishankar Atmaram*[5], a suit instituted in the Bombay Presidency before (though heard and decided by the High Court after) the Easements Act was extended to that Presidency, and to which therefore that Act was not applicable, the question as to implied reservations of continuous and apparent easements was the question for decision, and decided by the Division Bench before whom the question came, consisting of *Candy* and *Fulton* JJ. One Wallabh, the owner of a house and of half of an adjoining courtyard at the back of it, had sold his half of the courtyard to one Mancharam, retaining the ownership of the house, of which the plaintiff had subsequently become the owner. In the back wall of the house were two doors, which opened on to the said half of the courtyard, and were the only means of access of light to the two rear rooms of the house, and had been used, at and before the time of the said sale of that half of the courtyard, for the reception of light and air passing over the courtyard into the house, and also as an exit for the purpose of the occupants of the house going into that half of the courtyard and drawing water from a reservior and well situate therein. The defendant, who was Mancharam's successor in title, erected a hoarding on that half of the courtyard, thereby blocking the two doors and obstructing the passage of light and air through them. *Candy* J. held that the law established by the English decisions, based on the principle that a man shall not derogate from his own grant, ought to govern the case, because that principle was, in his opinion, "in consonance with the rule of justice, equity, and good conscience, which must guide the Courts" (in India) "in the absence of positive direction by the Legislature[6]," and because the instrument of transfer of the said

1. (1887) I. L. R. 14 C. 797.
2. (1899) I. L. R. 26 C. 516.
3. (1890) I. L. R. 14 B. 452.
4. (1871) 8 B. H. C. R. (O. C. J.) 181.
5. (1893) I. L. R. 18 B. 616.
6. (1893) I. L. R. 18 B. at p. 627.

half of the courtyard to the defendant's predecessor contained no reservation to the transferor of any right to light or air passing over it to the said two doors of his house, but contained an averment that thenceforth he had nothing whatever to do with the piece of ground conveyed and the reservoir and well therein. *Fulton* J. was not prepared to hold that the English law on the question as to implied reservation of continuous and apparent easements ought to be followed in all cases arising in India to which the Indian Easements Act did not apply, as being in all cases a law consonant with justice, equity and good conscience. He was of opinion that it was "conceivable that even in regard to light and air a case might arise where to hold that the vendee of an adjacent land was entitled to render useless the vendor's house by building up against his windows might be so obviously contrary to what was contemplated at the time of the sale and be productive, in the language of *Kindersley* V. C.—*Curriers Co.* v. *Corbett*[1]—of such "great and startling injustice" that a Court not bound by any positive rule of law on the subject might in the exercise of equity and good conscience think it necessary to hold that an easement had been meant to be reserved."[2] Being however of opinion, on the facts found and circumstances of the case before the Court, that the plaintiff had failed to make out a sufficiently strong case to justify the Court in holding that the right to light and air claimed had been reserved by the plaintiff's predecssor, he agreed with his learned colleague that the suit ought to be dismissed.

It may be that the enactment of the law laid down in paragraph (*d*) of S. 13 of the Easements Act was due, as it appeared to *Candy* J. to be, "to the fact that Mr. *W. Stokes*, who drafted and introduced the Easements Bill in 1878, was of opinion that the English law 'rests on a doubtful doctrine of *Lord Holt*—see *Curriers Co.* v. *Corbett.*[3]" It is to be observed,

1. (1865) 2 Drew & Sm. at p. 360.
2. (1893) I. L. R. 18 Bom. at pp. 629, 630.
3. See the judgment of *Candy* J. in *Chunilal Manoharam* v. *Manishankar Atmaram*, (1893) I. L R. 18 Bom. at p. 626. The *dictum* in question reported to have been made by *Lord Holt* in *Tenant* v. *Goldwin*, in which he delivered the judgment of the Court of King's Bench, is found in *Lord Raymond's* report of that case (1704) 2 Ld. Raym. 1093. In *Salkeld's* report of the case (1 Salk. 360) no such *dictum* is reported to have been made. In the report of the case in 6 Mod. 314 the Court is reported to have expressed a doubt upon the point.

however, that Mr. *Whitley Stokes* also had before him the judgment of *Lord Westbury* L. C. in *Suffield* v. *Brown*,[1] which was delivered many years prior to 1878, and in which the LORD CHANCELLOR affirmed, in the clearest and strongest terms the proposition reported to have been laid down by *Lord Holt* as being the English law, *viz.*, that there can be no implication of a reservation of apparent and continuous easements in the cases in question, on the ground that a grantor shall not derogate from his own grant. But *non constat* that Mr. *Whitley Stokes* (and the other members of the Legislature responsible for the Bill and its passing as an Act) did not, in deciding to lay down the law as it is laid down in paragraph (*d*) of S. 13, come to that decision upon, partly at least, other grounds than that supposed by Mr. JUSTICE *Candy*. They may have thought that the rule which has been enacted in that paragraph was in India (whatever might be the case in England) more in accordance with justice, equity, and good conscience than the English rule. They may have thought that the English rule went too far and stretched the doctrine that a grantor shall not derogate from his own grant beyond reasonable and just limits. It is submitted that there is much to be said in favour of the rule laid down in that paragraph. When the owner of a house and an adjoining vacant piece of land, the light passing over which land, or over a portion of it, he has been hitherto enjoying for the windows of the house, makes a grant of the house only, retaining the piece of land, the grantee of the house is entitled, both by the English law and by the law of India, to a right to that light for the windows, notwithstanding that the conveyence contains no specific grant of such right nor any general words such as "with the appurtenances," and the grantor cannot build on the piece of land retained by him so as to obstruct that light. Why? Because the easement is apparent and continuous. Nobody who went to the place could help seeing that the windows look out on the piece of ground and depend, for their light, on the light passing to them over the piece of ground or over a portion of it. But if he makes a grant of the piece of ground, retaining as his own the house, then, by the English law, unless he expressly reserves the right to light, he has no right to the light passing over the piece of ground or any

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1. (1864) 4 DeGex, J. & S. 185; s.c. 33 L. J. Ch. 249.

portion of it to the windows, and the grantee of the piece of ground can build on the whole or any part of it without any restriction and so as to obstruct and block the access of light to those windows, notwithstanding that the grantee, or his agent, or anybody, on visiting the place, at or before the time of the grant, must have plainly seen that the windows depend for their supply of light on the passage of light over the piece of ground or part of it. Is this law an equitable one, at least for application in India, whatever may be the case in England, where there has always been a tendency to construe deeds of grant strictly against the grantor? Why should it not be presumed in such a case that there was an intention to reserve such right to light, as much as it is, in the converse case, presumed that there was an intention to grant it? Is it not an equally reasonable and probable inference to draw in the one case that it was intended and understood by the parties that the use of that which was so obviously connected with and important to the beneficial enjoyment of the house should be preserved to the grantor, as in the other case that it was intended and understood that it should pass to the grantee along with the house? If human nature and probability are to be looked to, rather than any maxim of law, in considering what is consonant with justice, equity, and good conscience, is not the inference of intended reservation in the former case more reasonable than the inference of abandonment? In some cases, as in *Ray* v *Hazeldine*,[1] the access of the light passing over the aliened premises, or part of them, to a window or windows of a room of the house retained by the alienor of those premises is of such importance to him as to be, though not absolutely necessary, indispensable for the use of the room for the purpose, though an ordinary purpose, for which it had been used, unless artificial light were resorted to. LORD *Chelmsford* L. C. in *Crossley & Sons* v. *Lightowler*[2] said : "It appears to me to be an immaterial circumstance that the easement should be apparent and continuous, for *non constat* that the grantor does not intend to relinquish it unless he shews the contrary by expressly reserving it." But may it not be equally said, in the converse case, that *non constat* that the grantor intends to grant an apparent and continuous easement over another tenement which he retains unless he

1. (1904) 2 Ch. 17.
2. (1867) L. R. 2 Ch. Ap. 478, 486 cited in *Union Lighterage Co.* v. *London Graving Dock Co.* [1902] 2 Ch. at p. 567.

shews the contrary by expressly granting it? It did not exist as an easement at and before the time of the grant of the tenement; the case of easements, over property of a third person, already (before the grant) existing, attached to the tenement granted, stands on a different footing and they pass by the grant of the tenement, as appurtenances in the sense of pre-existing easements already annexed as such to it—Transfer of Property Act, S. 8; Easements Act, S. 19.

Even in the English Courts there has been considerable difference of opinion among Judges on the question here under consideration, and though the rule of law in England on the question has become now firmly established as being as above stated, there have been not only *dicta* of Judges, but decisions, in English cases, affirming the contrary rule,—the rule adopted by the Indian Legislature in paragraph (*d*) of S. 13 of the Easements Act. Most of the principal English cases on the question will be found reviewed by *Thesiger* L. J. in *Wheeldon* v. *Burrows*.[1] In *Palmer* v. *Fletcher*[2] the point was mooted, though not decided, and there was a difference of opinion amongst the members of the Court upon it. In that case a piece of land and a house with windows lighted by light passing over the land had belonged to the same person, who had sold the house, retaining the land, and the action was brought for obstruction of that light. *Levinz's* Report states that *Kelynge* J. said that, suppose the land had been sold first, and the house after, the vendee of the land could stop the lights, but that *Twysden* J. said: "Whether the land be sold first or afterwards, the vendee of the land cannot stop the lights of the house in the hands of the vendor or his assignees," and cited a case to be so adjudged [the report does not give the name or reference of the case so cited]. In *Pyer* v. *Carter*[3] the Court of Exchequer held, in direct contrariety to what is now the established law in England, that there is no distinction between implied reservation and implied grant, or, in other words, that whenever the implication of grant of an easement would arise, the implication of a reservation would equally arise supposing the position, as regards the tenements respectively granted and retained, were reversed. In the course of the argument in *Watts*

1. (1879) 12 Ch. D. pp. 50-60. 2. (1663) 1 Lev. 122.
3. (1857) 1 H. & N. 916 · s.c. 26 L. J. Ex. 258.

v. *Kelson*[1] *Mellish* L. J. expressed his opinion "that *Pyer* v. *Carter*[2] is good sense and good law," and *James* L. J. said: "I am satisfied with the decision in *Pyer* v. *Carter*.[2]" VICE-CHANCELLOR *Kindersley* appears to have considered the rule of the English law negativing the implication of reservations of continuous and apparent easements inequitable and unjust, at least in its operation in some instances, for in *Curriers Co.* v. *Corbett*[3] he said; "It has been determined that if a person having a house on his land, the windows of which have existed for more than twenty years, sells a portion of the land, the purchaser may erect any buildings he pleases upon the land so sold to him, however much they may interfere with the light coming to the windows of the vendor's house. That seems clearly to be the law, though it must be admitted that this law, if carried to an extreme, would in some cases produce great and startling injustice."

Lyttelton Times Co. Ld. v. *Warners Ld.*[4] in which the doctrine that a grantor cannot derogate from his grant was held not to preclude a grantor of a lease of the upper floor rooms of a building belonging to him from being impliedly entitled to an easement to cause a nuisance to the grantee, it being shewn that it was in the contemplation of the parties that the grantor should use the rooms on the lower floor, which he retained in his occupation, for a certain purpose, notwithstanding that it turned out that his user of them for that purpose, in a proper manner and without negligence, caused a nuisance to the grantee, is not a case belonging exactly to the same category as those under consideration in this article, but may be here noticed, as being a case of a presumption of implied reservation of an easement other than an easement of necessity being upheld as prevailing.

Mr. *Goddard* in his treatise on the English law of easements regards *Thomas* v. *Owen*[5] as a case of a decision that the implication of a reservation of a right of way over a formed road arises equally and to the same extent as the implication of a grant of such an easement arises. The learned author says: "In *Thomas*

1. (1871) L. R. 6 Ch. App. at a pp. 170, 171.
2. (1857) I H. & N. 916; s.c. 26 L. J. Ex. 258. 3. (1865) 2 Dr. & Sm. 355, 360.
4. [1907] A. C. 476. See also *Jones* v. *Pritchard*, "The Times" L. R. [1908], p. 309, in which, conversely, a grantee was held impliedly entitled against his grantor to an easement to cause a nuisance.
5. (1887) 20 Q. B. D. 225.

v. *Owen*[1], however, a reservation of way was distinctly allowed to be implied without any words of reservation in the grant, as the condition and direction of the road, as well as the long user of it for the sole benefit of the part of the estate reserved, was considered proof positive that the grantor of the servient tenement must have intended to reserve the right of way."[2] But if the report of the case be read carefully, it will be seen that the ground on which the Court of Appeal[3] held that the right of way was reserved and excepted out of the lease to the defendant of the farm leased to him, was that, prior to the lease to the defendant, the lessor had granted the right of way to the plaintiff, as tenant under him of another farm, and therefore the defendant's farm and the lessor's power of disposition of it at the date of the defendant's lease were subject to the right of way over it belonging to the plaintiff.[4]

In former editions of *Gale on Easements* the learned author expressed the opinion that, as the result of the authorities on the subject, the law of England was that reservations in favour of the grantor are implied, just as much as grants in favour of the grantee, of apparent and continuous easements which have been quasi-easements during the unity of ownership of the tenement granted and the tenement retained by the grantor, and that there is no reason why a purchaser should not exercise the same degree of caution in ascertaining what quasi-easements his projected purchase is liable to in favour of his vendor, as he is expected to exercise in respect to easements which it is liable to in favour of other adjoining owners.[5] But in the latest edition of the treatise the learned editor says: "This opinion, which was shared by Mr. *Willies*" (a former editor of the book) "must now be considered to be overruled.[6]" He goes on to say: "But in view of the importance of the controversy, it is worth while to consider the authorities on both sides." He then proceeds to review the cases.[7]

It appears that in some of the States of the U. S. of America the rule which has been adopted by the Indian Legislature in

1. (1887) L. R. 20 Q. B. D. 225.
2. Goddard on Easements, pp. 192, 193 (6th Edn.)
3. *Per Lord Esher M. R., Bowen* and *Fry L. JJ* (1887) 20 Q. B. D. 229.
4. (1887) 20 Q. B. D. 230-232.
5. Gale on Easements, pp. 99, 100, 103, 104, (5th Edn., 1876).
6. Gale on Easements, p. 138 (Edn. of 1899, by G. Cave).
7. Gale on Easements, pp. 138-151 (Edn. of 1899).

paragraph (*d*) of S. 13 of the Easements Act prevails, and in others the English rule prevails[1].

By the French law the grantor has, against the grantee, the same right of implied reservation of apparent easements as the grantee has by implied grant of such easements against the grantor: "*Si le propriétaire de dux héritages entre lesquels il existe un signe apparent de servitude, dispose de l'un des héritages sans que le contrat contienne aucune convention relative á la servitude, elle continue d'exister activement ou passivement en faveur du fonds aliéné ou sur le fonds aliéné*[2]." The Italian law on the subject is the same as the French—*Code Civ. Ital., Book II. Title III, Ch. II, Art.* 633. The writer has not, as yet, ascertained what is the law on the subject in Prussia and in other parts of Germany, and in Austria.

In the case of a sale of goods, such as, *e.g.*, the sale of a horse, the English law, as well as the Indian,[3] goes on the principle expressed in the maxim *caveat emptor*, in expecting the purchaser to inspect the thing bought before he buys it, and giving him (in the absence of fraud on the part of the seller) no right of action for any defect which he has failed to notice or detect in it before buying, unless he, the purchaser, takes an express warranty as to its quality. But in a sale of real property the English law, in the case under consideration in this article, does not, at the purchaser's peril, throw the burden on him of inspecting the tenement which he proposes to purchase before he purchases it, when that law refuses, as it does, whether the purchaser has inspected the premises or not before purchase, to regard the tenement purchased as subjected by implication to any apparent and continuous easement (not being an easement of necessity) in favour of a tenement retained by his vendor which was enjoyed as a quasi-easement at the time of the purchase ; though, in the converse case, it regards him as impliedly entitled (that is, though the sale-deed contains nothing, not even general words, so entitling him) to such easements over the tenement retained by the vendor. It might be said to proceed herein on a principle of *caveat venditor* rather than that of *caveat emptor*. Many probably

1. The American and English Encyclopædia of Law (New York: 2nd Edn.) Vol. X., pp, 420-425 (under head "Easements").

2. Code Civil, Liv. II, Tit. IV, Art. 694.

3. See Indian Contract Act, S. 116.

agree with Mr. JUSTICE *Fulton* when he said, in reference to the English doctrine as to implied grants and implied reservations of easements in the cases under consideration : " In England thus the agreement under which the sale has taken place is construed more strictly against the vendor than against the vendee[1]." Yet such a construction has been disapproved of by the House of Lords and by *Jessel* M.R., who in *Taylor* v. *Corporation of St. Helen's*[2] said : " Let us consider what was granted by this deed. Before doing so I will take the liberty of making an observation as regards a maxim quoted by Mr. *Christie*, and which is to be found, I believe, in a great many text-books, and, I am afraid, also in a great many judgments of ancient date, and that is, that a grant, if there is any difficulty or obscurity as to its meaning, is to be read most strongly against the grantor. I do not see how, according to the now established rules of construction as settled by the House of Lords in the well-known case of *Grey* v. *Pearson*,[3] followed by *Roddy* v. *Fitzgerald*[4] and *Abbot* v. *Middleton*,[5] that maxim can be considered as having any force at the present day."

If to imply a reservation in the one case is a derogation from the grant, is it not an arrogation to the grant to imply a grant of an easement in the other case, for in both cases you start with the hypothesis that the instrument of transfer is absolutely silent as to any easement in favour of the one tenement over the other? No one will deny that if you grant to a man a tenement without expressly reserving an easement over it, it is a detraction from his proprietary rights, unauthorised by the terms of the instrument of conveyance, to hold him under a certain restriction from building or exercising proprietary rights in some other respect on or in that tenement. But is it not equally a detraction from the proprietary rights of the grantor, unauthorised by the terms of the instrument, if, in a like grant, not expressly granting any easement, you hold him under such a restriction in respect of his tenement which he has retained? A Court in India, not bound by the English doctrine, but bound to decide according to justice equity, and good conscience, and with reference to the conditions

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1 *Chunilal Manoharam* v. *Manishankar Atmaram*, (1893) I. L. R. 18 B. at p. 628.

2. (1887) 6 Ch. D. 264 at p. 270.

3. (1857) 6 H. L. C. 61.

4. (1858) 6 H. L. C. 823.

5. (1858) 7 H. L. C. 68.

obtaining in India, has to ask itself, in a case of such a grant or transfer as above supposed, and where the case is not governed by the Easements Act, whether it is in accordance with justice, equity, and good conscience, having regard to these conditions, to hold that the addition of the easement should be implied in the one case but that the reservation of the easement should not be implied in the other case. Even the English law allows an exception to the rule against derogation from a grant in admitting, as it does, an implied reservation in the case of easements of necessity, and Mr. JUSTICE *Fulton's* judgment in *Chunilal Mancharam* v. *Manishankar Atmaram*[1] shows that he was of opinion, or at least strongly inclined towards the opinion, that, in cases arising in India not governed by the Easements Act, reservations ought sometimes to be implied of easements other than easements of necessity.

R. B. MICHELL.

NOTES OF INDIAN CASES

Surajmani *v.* Rabi Nath Ojha.—I. L. R. 30 A. 84 (P.C.) —It is trite learning that the construction of one will is no guide for the construction of another. But this is a rule more honoured in the breach than in the observance. It is sometimes said that precedents are of use in so far as they lay down general principles; but the statement of general principles is in almost every case qualified by reference to the facts or circumstances of the particular case. No two decisions on the construction of wills can therefore be said to be inconsistent with each other. It will be impossible to say that there is anything in the decision under notice that is inconsistent with the decision in *Mahomed Shumsool Hooda* v. *Shewukram.*[2] But there can, we think, be no doubt that some of the observations in the earlier case indicate a very different spirit of construction. The reference therein to the Hindu Law and to Hindu notions has at any rate been interpreted as warranting a *general* presumption and Courts in India have always leaned against such a construction of the will of a Hindu testator as would give to his widow unqualified control over his property—*Harilal Pranlal* v. *Bai Rewa.*[3] The

1. (1893) I. L. R. 18 B. at pp. 628, 629, 630. 2. (1874) L. R. 2 I. A. 7.
3. (1896) I. L. R. 21 B. 376.

present decision of their Lordships, though based on what is called the technical meaning of the word 'Malik,' would seem to proceed on the principle that the general rules laid down in the *Tagore case* as to the quantum of the estate conveyed apply as much when the donee is a widow as when the donee is a male. There are no words expressly making the estate alienable, but their Lordships hold that the fact that the donee is a woman and a widow will not be sufficient ground for cutting down the natural effect of the words used.

Walihan v. Jogeshwar Narayan.—I. L. R. 35 C. 189 (P.C.)—The language of their Lordships' judgment would seem to lend support to the view taken by *Rampini*, J. in *Ismail Khan Mahomed* v. *Hari Charan Pal.*[1] But we rather think that their Lordships' observations are not inconsistent with the remarks in *Tarakant* v. *Puddamoney.*[2] The decisions in *Barhamdeo Narain Sing* v. *Mackenzie* [3] and *Nandalal Rai* v. *Bonomali Lahiri* [4] are in accordance with the decision under notice. But they have been distinguished in a way by the majority (*Maclean* C. J. and *Mitra* J.) in *Ismail Khan Mahomed* v. *Hari Charan Pal.*[1] We think the view taken by the Allahabad High Court in *Baldeo Singh* v. *Dharam Kunwar* [5] is correct; and this is not inconsistent with the present decision of the Judicial Committee. Their Lordships no doubt observe "that the circumstance that some of the *media concludendi* might be the same in other actions does not vest the Court with any right or duty to pronounce upon them in a suit which has gone by the board because of the failure of the ground of action." But this is in answer to the argument of the High Court that "it is not desirable that the final decision of those questions should be postponed" till the widow's death. We are inclined to think that the word "pronounce" in the above extract from their Lordships' judgment must be understood in the sense of giving a binding adjudication and not merely of expressing an opinion for the guidance of the appellate Court, should there be an appeal. It may be that if the main issue which goes to the root of the claim had been first tried and decided adversely to the plaintiff the Court would not then be justified in going on "to take up and try the other questions." But their Lordships recognise that the Court may try the whole case at

1. (1904) 9 C. W. N. 60.
2. (1866) 10 M. I. A. 476 at p. 488.
3. (1894) I. L. R. 10 C. 1095.
4. (1885) I. L. R. 11 C 544.
5. (1901) I. L. R. 26 A. 234.

once and in this contingency there is nothing in their Lordships' judgment to suggest that under S. 204, C. P. C, a Court is precluded from giving its findings upon issues other than those on which its decision is based—see *Devarakonda* v. *Devarakonda*[1].

Lakhan Chunder Sen *v.* Madhusundan Sen.—I. L. R. 35 C. 209—It is not easy to follow the reasoning by which the learned Judges come to the conclusion that the right of the plaintiffs to bring an action was for purposes of computing the period of limitation *suspended* between the date of the first judgment in their favour and its reversal by the appellate Court.

S. 14 is not relied on, and the learned Judges admit that they 'feel grave doubt' whether the case falls within that section.

The case cannot be brought within any of the other sections such as Ss. 13,15 and 16 that allow of the *exclusion* of a particular period in computing the period of limitation. Only one section of the Act (S. 9) provides for the *suspension* of the *running* of time, as distinguished from a *suspension of the right to sue.* Another set of provisions fix a *special* starting point (as in Ss. 17, 18 and 24) or give a *fresh* starting point (as in Ss. 19 and 20) and in this class of cases, a plaintiff would have the *full* period of time from such starting point. The case under consideration does not come within any of these provisions.

Apart from the law of limitation, the substantive law may in certain events give a party a *new cause of action*, though by way of revival of an old claim, and even in this also the party would have the *full* period of limitation from the date of the new cause of action on which the suit is based. Such, for instance, was the case in *Bassu Kuar* v. *Dhum Singh*,[2] where the Judicial Committee expressly refer to S. 65 of the Contract Act. The second suit is not in such cases based on the old cause of action as it must be, if the right to sue had merely been *suspended* in the meanwhile.

We are not aware of any *general* principle of law that takes a case away from the operation of the rule enacted in S. 9 of the Limitation Act. When once time has begun to run, no subsequent *inability*—not only *disability*—to sue stops it.

1. (1881) I. L. R. 4. M. 134.
2. (1888) I. L. R. 11. A. 47 (P. C.)

No exception can be constructively introduced into an Act of Limitation on any 'principle of inherent equity'—*Beckford* v. *Wade*.[1] Observations like those contained in *Bassu Kuar* v. *Dhum Singh*[2] must be taken with the facts of the case in which they are made. 'The law would not compel a man to institute a perfectly vain litigation under peril of losing his property if he did not.' True; but the mere fact that for some reason or other a person could not during a *particular period* commence a suit does not *always* arrest the running of time or entitle the party to the *exclusion* of that period in reckoning time. Thus if a person dies *after* the right to sue has accrued, his creditor would not (under S. 17) be entitled to a deduction of the period during which there is no 'legal representative' (under the Succession Act) whom he can sue.

The decision in *Ranee Surno Moyee's case*[3] did not really proceed on the ground of a *suspension* but on the ground that the setting aside of the sale and the taking of possession gave rise to a *new ground of claim* for rent. This is analogous to the later case of *Bassu Kuar* v. *Dhum Singh*.[2] Can it be said, in the present case, that the mere reversal of Justice *Henderson's* judgment —without any possession under it and subsequent dispossession— gave rise to a *new* ground of claim? If that were so, this would give the plaintiff another full period of twelve years and not merely entitle him to the exclusion of the intervening period.

Reliance is placed on *Prannath Roy* v. *Rookea Begum*.[4] That case can be no guide under the present limitation law. The Bengal Regulation, there in question, expressly authorised the excuse of delay in filing *suits*, 'for good and sufficient cause,' but under the present law this indulgence is confined to appeals and applications for review.

Maclean C. J. refers to the duty of the Court to 'relieve parties against injustice occasioned by its own acts or oversights at the instance of the party against whom the relief is sought.' This is a sacred duty indeed, but not to be discharged by straining the law of limitation. The Court has got ample powers to do justice in such cases by way of review.

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1. (1805) 17 Ves. 87, 92; 11 R. R. 20
2. (1888) I. L. R. 11 A. 47 (P. C.)
3. (1868) 12 M. I. A. 244.
4. (1859) 7 M. I. A. 323.

Emperor v. Narayan Raghunath Patki.—I. L. R. 32 B. 111.—The unanimity of opinion in this case is very limited. Beyond agreeing in the result, the only point on which *all* the learned judges agree is that the manner in which the statement of the witness to the Police-officer was *used* at the trial was contrary to law. On the two *general* questions arising in the case, *viz.*, the true scope of S. 162 of the Criminal Procedure Code and the powers of the Court under Cl. 26 of the Letters Patent, there is a marked difference of opinion.

The distinction between using the 'writing' and using the 'statement' contained in the writing, seems to be a distinction without a difference. And from the proviso to S. 162, it would seem that a writing is 'used as evidence' as much when it is used to refresh one's memory or impeach the credit of a witness as when it is used as substantive evidence against the accused (but cf. *Birchall* v. *Bullough*[1]). There is much force in the reasoning of *Beaman* J. as to the *policy* of the section.

As to the other question, the statement in the head-note that in the opinion of the majority the Court has under Cl. 26 'power to review the whole case' is somewhat inaccurate and misleading. The power of the Court under S. 167 of the Evidence Act is different from that which appears to have been contended for, on behalf of the accused as a general power of review conferred by Cl. 26 of the Letters Patent. The former power, not even *Davar* and *Beaman* JJ. deny, though as to its scope, they differ from the majority. The question of the latter power—under Cl. 26—is expressly left open by *Chandavarkar* and *Batty* JJ., and the Acting Chief Justice mainly proceeds on his view of S. 167 of the Evidence Act, though he adds that "it would be difficult to put a different meaning on the word 'review' in a criminal case from that which is put upon it in a civil case." The learned judge then refers to S. 630 of the Civil Procedure Code and *Sainal Ranchhod* v *Dullabh Dvarka*,[2] and this would seem to indicate that in his opinion Clause 26 of the Letters Patent authorises the Court to 're-hear' the whole case. But no decided case goes this length and it may be noted that Cl. 26 only provides that the High Court shall have power 'to review the case or such part of it as may be necessary and finally

1. (1896) 1 Q. B. 325. 2. (1873) 10 Bom. H. C. R. 360.

determine such point or points of law ' and not ' to determine such point of law and review the case ' in whole or in part. The power of review would seem to be limited to what is necessary to decide the point or points of law reserved or certified. This is the view of *Davar* and *Beaman* JJ.

Some difficulty is caused by the words following: "and thereupon to pass such judgment and sentence as to the said High Court shall seem right." As pointed out by *Bayley* J. in *Reg.* v. *Navroji Dadabhai*,[1] it would be proper to construe this clause in the light of the law relating to and the practice of the Court for Crown Cases Reserved in England. And the word ' *thereupon* ' would seem to show that such judgment is to be consequent not upon a rehearing of the whole case but upon the decision of the point or points of *law*, under the foregoing part of the section. In *Subrahmania Aiyar* v. *King Emperor*[2] the question of the scope of Cl. 26 was raised before the Privy Council, but in the view which their Lordships took, it became unnecessary to decide this point. One observation in the judgment raises a question which does not appear to have been considered by the learned judges of the Bombay High Court. Their Lordships characterise the procedure of the Madras High Court as ' leaving to the Court the functions of the jury.' It is a point to be considered, whether this remark does not equally condemn the consideration of the *remaining evidence* by the *Court*, whether under Cl. 26 of the Letters Patent or under S. 167 of the Evidence Act.

It is, however, important that Cl. 26 of the Letters Patent should be considered apart from S. 167 of the Evidence Act—assuming this to apply to jury trials in criminal cases. This the cases do not always do. In *N. A. Subrahmanya Iyer's case*,[2] the Chief Justice relies on the words ' review the case' in Cl. 26, to avoid the principles laid down in *Makin* v. *Attorney-General for New South Wales*.[3] But if the power of ' review ' is limited, as above submitted, these principles would equally govern the Court sitting under Cl. 26 of the Letters Patent. But if a different construction should prevail, the powers under Cl. 26 would be very much wider than those under S. 167 of the Evidence Act. The clause is not confined to improper reception

1 (1872) 9 Bom. H. C. R. 358. 2. (1901) I. L. R. 25 M. 61.
3. (1894) A. C. 57.

or rejection of evidence, and as a general provision authorising a review, it may be argued, would even justify the alteration of an acquittal into a conviction.

SUMMARY OF ENGLISH CASES.

Goodson v. Grierson. [1908] 1 K. B. 761. (C. A.)

Gaming or gambling debts—Forbearance to sue for—Whether lawful consideration.

Forbearance to sue for even betting, gaming or gambling debts might be lawful consideration for a contract, as that it might obviate the consequences of an expulsion from club or of an injury to business.

" To use Lord Romilly's words in *Bull* v. *Yelverton*[1] the agreement would be given not to pay racing debts, but to avoid the consequences of not having paid them. "

Penn v. Spiers and Pond, Ltd. [1908) 1 K. B. 766. (C. A).

Workmen's Compensation Act, 1906 (6 *Edw.* 7, *C.* 58)—" *Weekly Earnings*"—*What are?*

On a consideration of the amount of compensation to be given by computing the amount of " weekly earnings " of a waiter at a restaurant car on a Railway, who was killed by accident on the railway, the following rule was laid down as to taking into account " tips " usually received by such employes :—

" Where the employment is of such a nature that the habitual giving and receiving of " tips" is open and notorious and sanctioned by the employer so that he could not complain of the retention by the servant of the money thus received, we think the money thus received with his knowledge and approval ought to be brought into account in estimating the average weekly earnings. * * * It is an implied term of the contract of employment that these tips should be part of his earnings in his employment, and by *virtue* of his employment. * * * We desire to state that nothing in this judgment extends to tips or gratuities (*a*) which are illicit; (*b*) which involve or encourage a neglect or breach of duty on the part of the recipient to his

1. (1870) L. R. 9 Eq. 471.

employer; or (c) which are casual and sporadic and trivial in amount. * * * The measure of compensation under the Act is not *wages*, but *earnings*. It is not every kind of earnings which can be taken into account. They must be earnings *in* the employment.

Baxter's Leather Coy. v. Royal Mail Steam Packet Coy. [1908] 1 K. B. 796.

Ship—Bill of lading—Carriage of goods—Limiting liability for a certain amount—Validity of.

In a case where no gross negligence was proved, a clause in a bill of lading running as follows: "The master, etc., shall not be accountable for * * * goods of whatever description beyond the amount of £ 2 per cubic foot for any one package" was *held* to exempt the owner from liability beyond £ 2 for loss occasioned even by his negligence.

Tate v. Fullbrook. [1908] 1 K. B. 821. (C. A.)

Dramatic Copyright Act, 1833 (3 & 4 *Will.* 4, *C.* 15) *S.* 1 *and Act of* 1842 (5 & 6 *Vict.*, *C.* 45)—*Whether copyright extends to scenic effects, etc.*

Copyright in a dramatic piece extends only to that "which is capable of being printed and published." There is no infringe ment of copyright if the piracy be (a) very trivial and in an inappreciable degree or (b) in the similarity of stage situations, scenic effects, etc.

Yangtsze Insurance Association v. Indemnity Mutual Marine Assurance Co.
[1908] 1 K. B. 910.

Marine Insurance—Warranty not to carry contraband of war—Transport of "contraband persons"—No breach of warranty.

It is no breach of warranty of a policy of marine insurance containing a condition not to carry contraband of war, if the ship carries military officers of a belligerent State, for "contraband of war' is an expression which, in ordinary language, is used to describe certain classes of material and does not cover human beings"; though the "transport of 'contraband persons'

may, no doubt, in some cases involve the same consequences to the ship as the carriage of contraband; so may other acts on the part of the ship, as, for instance, transmitting information to the enemy" * * * "If they are contraband the Admiralty Courts must have power to deal with them." "The most recent text-writers treat persons as outside any accepted definition of contraband." That is the "plain meaning of the words, and the sense in which they are always understood among underwriters and merchants."

Simpson v. South Oxfordshire Water and Gas Company. [1908] 1. K. B. 917.

'Neglect or refuse to supply'—Meaning of, in a penal section—Insufficient supply.

The words 'neglect or refuse to supply water' to a customer in a *penal* section affecting a Water Supply Company of a town would ordinarily contemplate a *total* neglect of refusal to supply and not an insufficient supply as the basis of penalty.

In re **Myers**—*Ex parte* **Myers**. [1908] 1 K. B. 941.

Bankruptcy—Sham sale by debtor—Fraudulent preference—No right to prove for money paid.

"A creditor who executed a composition deed, upon the face of which he was to be paid *pari passu* with the other creditors, and at the same time secretly stipulated for a preference, upon discovery of the fraud" is "not entitled to prove even for his undoubted original debt which by the terms of the composition deed he had released. The reason of this is that if a man will enter into a transaction of this kind, it binds him so far as it is to his disadvantage though it does not bind the other creditors.' "It is a universal rule that a fraudulent deed, though operative against the fraudulent party to it, is not operative *for* him, and therefore confers on him no rights whatever."

British Cash and Parcel Conveyors, Limited v. Lamson Store Service Company, Limited.

[1908] 1 K. B. 1006 (C. A.)

Maintenance of suit—Common interest—Trade rivals—Offer of indemnity to customers.

"Defendants, being rivals in trade of the plaintiffs, obtained, by legitimate means, orders from certain persons, accepting the responsibility of litigation, if litigation should ensue by reason of the plaintiffs setting up that the order given to the defendants created some right of action by the plaintiffs against the party who gave the defendants their order."

Held that this responsibility was only an indemnity like all other kinds of legal indemnity, and did not amount to *maintenance* for the defendants are entitled to advance their own business by indemnifying customers who might desire to employ them.

JOTTINGS AND CUTTINGS.

What Great Lawyers Receive for their Work.—Fifty millions of dollars—enough to buy New Port and all of its villas at their assessed valuations—is a conservative estimate of the money that goes every year into the pockets of New York lawyers. It is based on the opinion of a noted attorney while talking last week of the fees paid to Willam M. Ivins, the "sharp stick" of the Public Service Commission, whose acumen and skill have been compared with that of the Governor Hughes.

The lawyer was pessimistic rather than given to exaggeration. On one side were fees of $ 750,000 and $ 1,000,000 earned in single cases. Among the great lawyers 1,000,000 fees are not unusual. Then the talk drifted to Mr. Ivins. The records of Controller Metz's office show that on November 25th last he was paid $ 5,000 for his work as special counsel for the Public Service Commission. This was for work which included the examination of Anthony N. Brady. Besides this fee of $ 5,000 to Mr. Ivins, $ 10,000 was set aside last July to pay the Commission's regular lawyers. Mr. Ivins' other bill to the city last year was $ 12,500 paid on April 9 last for the street cleaning investigation.

The reporter remarked the disparity between a $1,000,000 or even a $ 1,000,000 fee and the $ 17,500 of public money paid to Mr. Ivins. This opened up the whole subject of lawyers' fees.

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Small fees of the Past.—The fees of the great attorneys of the past, for instance, seem pitifully small. Rufus Choate, even

when recognized as one of the greatest of the American lawyers, took cases for $ 50, again and again. It was only toward the close of his career that he thought that sum too small. Aaron Burr, a successful practitioner in his day, accepted cases for much less. Daniel Webster, in the height of his legal career in Boston —in the days of the Dartmouth College Case—earned $ 20,000 a year. Before his life ended he accepted contributions of money from his friends. The same was true of Henry Clay.

Like Lincoln, both of these famous men sacrificed much to public life. One of Lincoln's largest fees while a lawyer in Illinois was a land warrant for his services in the Black Hawk war. He took a tract of land in Iowa, opposite Omaha. His fellow-lawyers took him to task for accepting small fees, or none at all, saying it demoralized the profession. "Old Abe," as he was then called, defended two boys on murder charges and would take nothing for it. When he came to New York in 1860 to deliver his famous address at the Cooper Institute, an old friend asked him how he fared in the world.

"Oh, very well" Lincoln is said to have replied "I have a cottage at Springfiled and about $ 8,000 in money. If they make me Vice-President with Seward, as some say they will, I shall be able to increase it to $ 20,000, and that is as much as any man ought to want.

Lincoln's fortunes were almost in this condition when he went to the White House as President.

When New York lawyers talk of attorneys who have earned big fees they usually mention William Nelson Cromwell among the first. He is "a physician of Wall Street." the new type of lawyer bred by the growth of great corporations, the most skilful reorganiser of wrecked business enterprises, in the legal profession. But among laymen he is better known as the man who earned $ 1,000,000 when we bought the Panama canal.

Mr. Cromwell, a small secretive, and rather nervous man, has been compared to a mole foi the way he burrows into intricate business problems. He combines a legal judgment with brilliant financial skill.

A man with such a unique genius might be expected to make exceptionally large fees. His first big case, for instance, brought

him $ 260,000. This was in November 1890. The brokerage firm of Decker, Howell & Co., was forced to suspend with liabilities of $ 10,000,000. Mr. Cromwell was made assignee. He managed the affairs of the concern so skilfully that he declared a dividend of 100 per cent. He was paid $ 222—16—for this work.

The many great cases that have since added to Mr. Cromwell's fame were overshadowed by his fee for the Panama canal deal. Busy as he was here, Mr. Cromwell found time to look into the higher policies of Central and South America. How he got track of the situation in Panama is a mystery. When he became general counsel for the new Panama Canal Company in 1896 the isthmian route hardly had a friend in this country. He quietly started the campaign to have the United States buy the property, won over the French bond-holders, gained supporters for the scheme of this country, and finally offered the United States the option of the canal for $ 40,000,000. What came after—the failure of the Hay-Herran treaty, the Panama revolution, said to have been planned in New York, and the hastening of the negotiations,—is familiar history. But as a monument to the genius of Mr. Cromwell was a fee the like of which can hardly be paralleled in the history of the legal profession. It was not a fee, properly speaking, but a commission. The lowest estimate of it was $ 1,000,000. In reality Mr. Cromwell's profits have been estimated as nearer $ 2,000,000.

Equally remarkable in its way was the fee William D. Guthrie received in the Plant Will Contest. He was counsel for Mrs. Margaret J. Plant, the widow of Henry Bradley Plant, the aged railroad magnate. When Mr. Plant died in June 1900 at New Haven, Conn., his estate was worth $ 17,000,000. The point in the contest was whether Mrs. Plant should receive an annuity of $ 30,000 by the terms of the will, or have the will set aside and get about $ 7,000,000. The contest depended on a codicil making the heirs of Mr.Plant's six years old grandson the residuary legatees and tying up the fortune until the youngest son of the grandson reached his majority.

When the case came up for trial, before Justice Leventritt in the Supreme Court, just seven years ago, lawyers believed that the suit was a doubtful one. The codicil could be set aside if the

will was offered for probate in New York. Connecticut was the only state in which such a provision would be legal.

So the case turned on a question of domicile whether Mr. Plant was resident of New York or of Connecticut. He went to Connecticut, a few days before his death, so the contestant claimed, to avoid the New York law and establish a residence in New Haven.

Lawyers say that Mr. Guthrie deserved all the credit he got for winning the suit. To his persistence in gathering evidence that should make Mr. Plant a New Yorker and set aside the codicil, to his skill in presenting it and questioning the witnesses, Mrs. Plant owed the $ 7,000,000 her attorney won for her. Mr. Guthrie's fee is said to have been between 10 and 14 per cent of this fortune somewhere between $ 75,0000 and $ 1,000,000.

Of the many big fees Mr. Guthrie has received, the most significant was the $ 80,000 paid to him in the proceedings to test the constitutionality of the income-tax. It was a case in which methods counted far more than fees, and Mr. Guthrie's tactics made his fame national. He devised the method under which the proceedings should be brought so that they would not violate the statute against suits to restrain the assessment or collection of federal taxes He drafted all the papers and made the opening argument before the United States Supreme Courts.

" When you hear of very large fees paid to lawyers by corporations," said the lawyer, " you must remember that the knowledge and ingenuity of these attorneys often make the big combinations of capital possible. The business man goes to the lawyer with the germ of the idea. The lawyers arrange a corporation that will be legal and able to withstand attacks upon it. Often the lawyers' original ideas go into the consolidation. The lawyers usually receive a block of stock for their work. It is, to a certain extent, a contingent fee, for its value depends upon the success of their work. "

To this class belongs Edward Lauterbach, who promoted the East River Bridge Company, re-organized the Philadelphia and Reading Railroad Company, consolidated the turbulent affairs of the Union Brooklyn and Elevated railroads into one prosperous concern. Among the others the men whose peculiar talents also

run to corporation law are Samuel Untermyer and Secretary of State Route. Mr. Untermyer is credited with having received a fee, or commission, of more than $. 1,000,000 for the deal by which he induced foreign capitalists to invest money in this country and in the consolidation of the American breweries. It is estimated that with his genius for financial law he can earn $ 500,000 a year and command $ 1,000 a day for appearances in Court.

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Secretary Route, Corporation Lawyer.—Lawyers regard Secretary Route as probably the greatest Corporation lawyer in the United States. Mr. Route gave up a law practice estimated to be worth from $ 80,000 to $ 100,000 a year to take a place in the cabinet paying $ 8,000 a year. This was when he succeeded Secretary Russel A. Alger of the War Department.

But the most typical of all the Corporation lawyers was found in a remote room on an upper floor of a William Street sky-scraper. In appearance he might have been a brother of George William Curtis. He is John E. Parsons, a New Yorker born and bred, legal adviser for big Corporations and estates, and, as a lawyer, believed to have the finest practice in the country.

Mr. Parsons is reputed to have received one of the largest fees ever taken by a lawyer when he drew up the charter of the sugar trust. According to report, he realized $ 400,000 for this service. As general counsel for the trust he also defended it during the attack upon the combination a few years ago. That defence is said to have added another $ 100;000 to his fortune.

Contrasted with these types of Corporation lawyers is the general practitioner. Former Ambassador Johnson H. Choate is a typical example. John G. Johnson of Philadelphia, is another.

Speaking facetiously of Mr. Choate at a public dinner, Chauncey M. Depew is said to have remarked that, " only unselfish millionaires could employ Mr. Choate as their lawyer, because they would have to give up about all they had to pay his fees.

Yet lawyers said last week, indeed, that Mr. Choate's fees were not large compared with $ 1,00,0000. Mr. Cromwell received in the Panama Canal deal, the $ 750,000, paid Mr. Guthrie in the Plant will contest, or the reputed $ 400,000 fee to Parsons for forming the sugar trust.

Mr. Choate was admitted to the New York bar in 1856. As protege and partner of William M. Evarts, he won immediate success, and gained an enormous practice and a very large income. By 1890 he was considered a leader of the New York Bar. For nearly thirty years there was hardly a great case in which he was not one of counsel—the prosecution of the Tweed ring, the famous investigation of Gen Fitz John Porter's conduct, which ended in a reversal of the judgment of the original Court Martial: the celebrated libel suit against Gen D. Cesnola, the Tilden will case, the litigation over Commodore Vanderbilt's millions and the suit of David Stewart against Collis P. Huntington, to mention only a few of them. Mr. Choate is said to have received fees of $ 100,000 on a number of occasions. When he was named as ambassador to England by President McKinley, in 1898, he had earned a fortune in his forty-two years practice amounting to something over $ 1,000,000. At that time his income, chiefly from his law practice, was estimated at $ 100,000 a year. It is said of Mr. Choate that he would probably be richer if he had devoted himself to corporation rather than to general practice, but that he would only do so at the sacrifice of that excitement and interest which he finds as an advocate.

John G. Johnson of Philadelphia, is generally recognized as one of the greatest lawyers in the country. He once declined a seat on the bench of the Supreme Court of the United States because, he said, that with his income of $ 100,000 a year he would be reduced to poverty if he agreed to become a justice at $ 8000 a year.

Mr. Johnson has since been paid $ 100,000 for a single case like the Northern Securities litigation, involving the Union, Pacific merger. But lawyers say of him that he will also take $ 100 cases with $ 5 fees to right an injustice or punish crooked dealings when the victims are poor. Attorneys also say of Mr. Lauterbach that in the same spirit he will lose a fee rather than have a client leave his office smarting under an injustice.

A story told of Mr. Johnson in this connection is specially characteristic of the man and his ways. An estate worth about $ 45,000 was badly tangled and in litigation. On one side were the women of the family. They knew nothing of business. The property was all they had for their future support. On the other

side was a claimant with shrewd lawyers, and apparently the better of the case. At first hearing the decision was against the women.

There was still a forlorn hope. A great lawyer could save $ 45,000 for the women. Would Mr. Johnson undertake it? There were two discouragements to such a plan. The evidence was unusually complicated. To disentangle the facts would be worth a lawyer's fee that would probably leave little of the estate.

Nevertheless the women's lawyers took the papers to Mr. Johnson. He said he would read them overnight. It is one of Mr. Johnson's peculiarities that by ignoring details he can reach the very heart of a controversy in the shortest possible time, then express the gist of it in a few simple words. The next day the women's lawyer called on Mr. Johnson.

" I'll take the case " he said.

He did so and fought the suit through the Country and Appellate Courts. He saved the $ 45,000 for the women.

" What will be your fee, Mr. Johnson? " One of his clients asked.

" I will charge you $ 1000 " he replied.

When the women recovered from the surprise, they were rather hurt. They were proud and felt that they were an object of the lawyer's charity. Mr. Johnson was stubborn about it. He insisted that his services were worth no more.

A lawyer who is an authority on the question of fees drew an interesting comparison between the altered standard of fees, past and present.

" The lawyers of the old school " he said, " had a very moderate notion of fees. When I was student under Mr. Evarts and Mr. Choate $ 250 seemed to be the average fee and $ 500 the exceptional fee with a tendency to charge women little or nothing. I think Mr. Choate's fees all his life have been much less than is charged or supposed to have been in exceptional cases by men like Guthrie and Cromwell.

" I think you will find that what seems a big fee is really a small one, because the money gained for the clients could not have been gained by others. One day Gen Roger A. Pryor came

into luncheon at the lawyers' Club and said ; ' Have any of you noticed the remarkable cross-examination of the gas monopolists ? It is being conducted by a young man named Hughes.' General Pryor spoke of an experience of sixty-years, more, or less, and said that ' he heard no cross-examination like it ; the state and the people made a good investment when they hired that young man Hughes." Yet Governor Hughes' fees were not large according to what such ability would command from private clients. They were small. But the returns to the people—the gains in lower price of gas and in the moral recompense—were very large."

The largest attorneys' fees received by Governor Hughes is said to have been the $ 25,000 paid him for his work in the insurance enquiry. When he became a candidate for Governor it is doubtful whether he was worth more than $ 100,000. A noted Corporation lawyer, speaking of Mr. Hughes, said that he was not a money-maker and was one of the few lawyers who consulted their clients as to the size of his fees. The lawyer continued :

" Always what seems a large fee to the up-country legislator is really a small fee down here. Expenses are larger. Loss in other business is many times as large as in the up-country districts.

" As to contingent fees, there are many popular misconceptions. In the first place, many a monopolist would go unwhipped of justice, as the Courts have said in their opinions, but for the fact, that the poor who has no money or the man of moderate means who feels he cannot risk money can employ counsel on a contingent fee.

" I personally believe that no provision in our statutes is more American, in the better sense, than the provision for a contingent fee. Every lawyer of standing, in one shape or another, makes his fee contingent in part or entirely upon his success. No modern lawyer would think of charging a full fee on a failure except in the rare case of a client whom he never expects to see again. I know that some charge too large a contingent fee, but many charge only ten, fifteen and twenty per cent. and some charge as little as five per cent. in rare instances.

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How the fees are fixed.—A student went to James Russell Lowell and said, 'Professor I think you have marked me unjustly.' ' Sir,' said Mr. Lowell with his grand courtsey, ' I would not

willingly wrong you ; will you tell me how you think you should be marked ?' The student set forth his views, and Mr. Lowell admitted them. I think it has been the common practice of such men as Mr. Choate and Mr. Evarts, to ask clients their view about their fee and to fix the fee largely accordingly. And then even more than with the medical profession, it is the custom of lawyers to make low charges to the poor and unfortunate, and to charge women little or nothing." But the surprising fact remains as one lawyer said that of the 11000, fully two-thirds, or 7300 of them do not make more than $ 3000 a year.

Yet at this estimate the 7300 attorneys earn nearly $ 2,200,0000. The twenty-five lawyers making $ 100,000 each put another $ 2,500,000 into their pockets. Allowing $ 5,000 each for the $ 3,600 practitioners remaining – a conservative estimate—they would add $ 1,837,5000 to the expense bills of litigants.—*The Law Students Helper*.

CONTEMPORARY LEGAL LITERATURE.

In an article in the *Canada Law Journal* forl March, the learned writer endeavours to show that a tenant for *life* is as much as a tenant for years liable for *permissive* waste. *In Re Cartwright*[1] and *In re Parry*[2] are considered to be opposed to the ancient interpretation of the Statutes of Marlbridge and Gloucester.

An interesting article by Mr. Beale in the January Number of the *Harvard Law Review* discusses the nature and history of the different kinds of Contempt of Court and the appropriate methods of dealing with them. "Contempt" has long been punishable in England as an *insult* to the King, to Parliament or to the Court. Punishment for *disobedience* of an order or decree of the Court is of later growth. "Contempts of Court" so called, are of *two* kinds, entirely different in origin. Contempt proper or *active* contempt is "any act which interferes with the operation of the Court itself, while engaged in the trial of cases or which renders the Court less able properly and with dignity to try cases." It may be by way of direct insult to the Court itself in its presence, or by acts done outside the Court which, however, directly obstruct the course of Justice or by interference with persons or property under

1. L R. 41 Ch. D. 532

2. L. R. (1900) 1 Ch. 160.

the charge of the Court. In these cases the contempt is a *crime* and the punishment is *punitive.* The "so called contempt which consists in mere disobedience to an order of the Court" the author calls *civil* contempt. In such cases, the punishment is only *coercive.* The Court does not act *suo motu* ; "the violation is called to the attention of the Court by the injured party, and, if the violation is proved, the wrong-doer is committed to prison to remain until he purges himself of his contempt by doing the right or undoing the wrong."

In a most instructive article in the *Harvard Law Review* (Feb. '08) Mr. Bohlen of the University of Pennsylvania examines the various theories upon which it has been from time to to time attempted to explain the defence of "Contributory Negligence." Three theories are commonly advanced. "It is maintained that it depends on the application to the particular facts of the rule governing (1) proximity of legal causation ; (2) indemnity or contribution between joint tort-feasors ; or (3) voluntary assumption of risk as expressed in the maxim *volenti non fit injuria.*"

(1) The rule might be stated thus :—"If the plaintiff's act was any part of the legal cause of his harm, he can have no legal redress against a defendant whose misconduct was also part of the legal cause of harm." But the subject of legal causation already replete with difficulties, does not fully account for the defence of contributory negligence. The defendant is excused not merely because some *other event* intervened between his act and the injury to the plaintiff, thus breaking the chain of causation, but because the intervening act is that of the *plaintiff himself.*

(2) "The defence of contributory negligence cannot be ascribed to the rule which denies contribution or indemnity between joint tort-feasors. Contribution and indemnity are concerned with joint wrong-doers" * * * "It has never been applied to cases of *concurrent* but *independent* wrongs to the combined effect of which the harm is due and where the only point of contact is in the combination of their effect in bringing about the final catastrophe."

(3) "It seems equally undoubted that the defence of contributory negligence is not a mere variation nor an application to

the specific facts of the rule that one who voluntarily encounters a known risk can blame no one but himself for the ensuing harm."

The two are entirely distinct; (*a*) voluntary assumption of risk negatives the idea of even *prima facie* liability; (*b*) the plaintiff must voluntarily, consciously and deliberately elect to encounter a known risk, and (*c*) the plaintiff's inability to recover compensations in such cases is not based on any thought that he has acted improperly or fallen short of the normal standard of proper behaviour. Contributory negligence, on the other hand, (*a*) is an affirmative defence operating to displace a liability *prima facie* established; (*b*) it excludes the idea of deliberation; and (*c*) its essence is that the plaintiff has misconducted himself, that he has done or omitted to do something which, under the circumstances of the case, a reasonably prudent man would not have done or omitted to do.

The law throws on every individual the primary burden of protecting his own interest. No man is "his brother's keeper" and when common prudence and caution, according to the state of the society in which he lives, are sufficient to guard a person, the law will not protect him in his negligence. The duty of care for others should be no higher than the duty of self-protection. This is the true basis of the doctrine of contributory negligence. Where, however, the defendant's wrong is *intentional*, contributory negligence would be no defence. Only *consent*, express, or necessarily implied from the circumstances, will bar recovery of compensation.

The attitude of the Courts and Lawyers towards Statute Law in its relation to Common Law is condemned by a learned writer in the *Harvard Law Review* (April 1908. 'Common Law and Legislation'). In the opinion of the writer, "the proposition that statutes in derogation of the common law are to be construed strictly has no justification.* * *It is not necessary to, and inherent in, a legal system; it is not an ancient and fundamental doctrine of the common law; it had its origin in archaic notions of interpretation, now obsolete, and survived in its present form because of judicial jealousy of the reform movement." The theory of the Roman and the Continental Law was very different, but the rise and development of a vigorous body of Judge-made law in the King's Courts and the feebleness and paucity of legislation from

Edward II until Henry VIII contributed in England to the origin of the view that statute law only furnishes rules for *particular* situations and lays down no principles for cases not within their tenor or from which to reason by analogy. Lord Nottingham is reported to have said that "all Acts which restrained the common law ought themselves to be restrained by exposition." The prevalent "judicial antipathy towards legislative innovation" is unwarranted. The presumption of legislative intent not to interfere with the common law, may have been justified in a period of rare and scanty legislation, but is unsuited to the modern era of all-sided legislative activity. In the 16th and 17th centuries the judiciary in England stood between the people and the oppressions of the Crown; but they should no longer stand between the people and the laws made for them by their own representatives. Judge-made law is inadequate to deal with the complex needs of modern society, and legislative law-making must be its chief reliance. New situations demand *new* principles which the Courts cannot openly introduce. "To economists and sociologists, judicial attempts to force Benthamite conceptions of individualism upon the public of to-day are no less amusing—or even irritating—than legislative attempts to do away with or get away from these conceptions are to bench and bar."

"The Test of Conversion" is the subject of a short article in the *Harvard Law Review* (April 1908). "It seems to be well settled that there is no conversion without some physical act of intermeddling with the chattel, such as taking or transferring possession, detention, use or preventing removal.* * *The troublesome question is, what more is necessary besides such physical interference? Must there be coupled with it the intent to deprive the plaintiff permanently of his rights in the chattel, or is something less sufficient?"

The learned writer is of opinion that such intent is necessary; "the intent here, as in other parts of the law, means the probable intent as gathered from all the circumstances."

BOOK-REVIEWS.

Mozley and Whiteley's Law Dictionary : Third Edition : By LEONARD H. WEST L. L. D., and F. G. NEAVE, L. L. D. (1908) : Butterworth Co., 11 and 12 Bell Yard, Temple Bar, London, W. C., 10/6 net.

This is one of the "Hornbook" series of students' text-books, being uniform with such well-known hand-books as Powell on Evidence, Fraser on Libel and Slander, Underhill on Torts, on Trusts, on Wills, etc. The plan of the book is, as it should be, being intended chiefly for students. There is no reference to case law, but all legal terms and phrases are briefly and clearly explained in simple popular language. A number of Latin expressions and well-known legal maxims are also given with translations. References are frequently given to important text-books and to statutes. One particularly useful feature of the book is the complete alphabetical list of law reports (English, Irish and Scotch) similar to Cane's Tables, given on pages 284 to 297.

Institutes of Mussalman Law, By NAWAB A. F. M. ABDUR RAHMAN, Bar.-at-law, Judge, Presidency Court of Small Causes, Calcutta: Published by Thacker Spink & Co., Calcutta, 1907.

As the title of the book indicates, this is an attempt to state in a series of propositions the Mahomadan Law in some of its principal heads. The law of inheritance, wakf and pre-emption is reserved for a subsequent volume. The present one deals with the law of marriage, its effects and dissolution, paternity and sonship, and the mutual rights and duties of parent and child, and the law of gifts and wills.

We fully approve of the plan of the book. It necessarily excludes much discussion, but secures the immense advantage of clearness and certainty in the statement of the law. Sir ROLAND WILSON'S book proceeds somewhat on the same plan, but to those who have the advantage of a knowledge of Arabic the present volume offers the opportunity of reading in the original from the Appendix the texts corresponding to the Articles in the body of the book. The work is based on a Code of Mussalman Law prepared for the Egyptian Government more than 30 years ago by a body of leading *Ulemas*, and this vouches for its authoritativeness. In the absence of a Code of personal law passed by the British Legislature in India the learned author considers works

of this kind the best substitute. The law is stated according to the rules of the *Hanafite* school ; but the principal divergences between this and the *Shia* school are also noted in their proper places. The Articles are not unduly laconic, and the statement of the law is couched in simple language. The notes under each Article refer to the principal Arabic authorities (which are extracted in the Appendix) and to well-known Anglo-Indian works or translations such as Baillie and Hamilton; and there are also brief references to decided cases. A detailed chapter of contents and a copious index afford the fullest facilities for reference. The get-up of the book leaves nothing to be desired. We strongly recommend the book to the Bench and the Bar alike and to all interested in the study of Mahomedan Law.

Criminal Appeals: By A. C FORSTER BOULTON .—This is a useful publication. It contains short notes on the New Criminal Appeals Act. It is an important experiment undertaken by Parliament at the instance of Lord Loreburn. We in India cannot but think that the experiment is bound to be a success. The review by the Home Office was sure to be discredited as a poor expedient. There are many ways in which a miscarriage of justice may occur. The Criminal Appeal Court constituted under the new Act which will probably consist of five Judges, though a Court of three Judges is possible under the Act, will prove a particularly strong Court. Its decisions are generally final, though there is a provision for a further appeal to the House of Lords on questions of exceptional public importance.

We congratulate the author on the concise notes he has added to the Sections. The decisions of the new Court will acquire an importance and an authority outside the limits of the British Isles which may tend to harmonize and unify the administration of the Criminal Law throughout the British Empire.

Law of Torts: By HUGH FRASER : Published by Sweet & Maxwell, Limited. Price 8 *s*.

As a compendium of the Law of Torts the book has been popular among the students and the beginners of law. There can be no doubt that the object of the author is that the book should serve as a compendium and not as a cram book. There can equally be no doubt that many of the students actually use it as a cram book, and that many of the students have passed the

law examinations with no knowledge of the subject beyond what is contained within the four corners of this book, but that is, however, no fault of the author.

Acknowledgments.

We beg to acknowledge receipt of the following publications :—

Criminal Appeals, by A. C. Forster Boulton.

Diseases of Workmen, by T. Luson, M.D. and R. Hyde, M.R.C.S.

Indian Insolvency Act, by T. S. Rajagopala Aiyar.

Law of Torts by Hugh Fraser.

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